PAGE

Jones v. *Commissioner*, 31 F. (2d) 755 (C. C. A. 3).. 15

Levey v. *Helvering*, 68 F. (2d) 401 (App. D. C.) .14, 19, iv
Lougee v. *Commissioner*, 63 F. (2d) 112 (C. C. A. 1), aff'g 26 B. T. A. 23 19
Lunsford v. *Commissioner*, 62 F. (2d) 740 (C. C. A. 6) 15, 17
Lynch v. *Alworth-Stephens Co.*, 267 U. S. 364, 370... 10

Noel v. *Parrott*, 15 F. (2d) 669, 671 (C. C. A. 4), cert. den. 273 U. S. 754 .....10, 19, i, ii

Old Colony Railroad Co. v. *Commissioner*, 284 U. S. 552, 560 10
Old Colony Trust Co. v. *Commissioner*, 279 U. S. 716. 22

Ream v. *Bowers*, 22 F. (2d) 465 (C. C. A. 2)..... 21
Reed v. *Seymour* [1927], A. C. 554, 11 Tax Cas. 625.. 29
Rice v. *Eisner*, 16 F. (2d) 358, 360 (C. C. A. 2)..... 21
Rogers v. *Hill*, 289 U. S. 581-582 .....14, vi
Rose v. *Grant*, 39 F. (2d) 338 (C. C. A. 5)..... 21

Schumacher v. *Commissioner*, 27 B. T. A. 895.....18n
Schumacher v. *U. S.*, 55 F. (2d) 1007 (Ct. Cls.).....18n
Simpkinson v. *Commissioner*, 89 F. (2d) 397 (C. C. A. 5) .....15, ix

United States v. *Merriam*, 263 U. S. 179, 186-7..... 22
United States v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189..... 21

Walker v. *Commissioner*, 88 F. (2d) 61 (C. C. A. 1).. 15, v, vii
Washburn v. *Commissioner*, 51 F. (2d) 949, 951 (C. C. A. 8)..... 31
Weagant v. *Bowers*, 57 F. (2d) 679 (C. C. A. 2).... 19
Woolford Realty Co. v. *Rose*, 286 U. S. 319, 327..... 10

STATUTES CITED

PAGE

Judicial Code, § 240(a), 43 Stat. 938..... 1
Revenue Act of 1926, § 1003(a), 44 Stat. 110..... 1
Revenue Act of 1928, § 22, 45 Stat. 797-8.....2, 3, 10
Revenue Act of 1932, 47 Stat. 245..... 11

OTHER AUTHORITIES

House Report No. 708 (72d Congress, 1st Session)... 11
Senate Report No. 665 (72d Congress, 1st Session)... 11
Webster's New International Dictionary (2d Edition). 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

ARTHUR G. BOGARDUS,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 15

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 9) is unreported. The opinions of the Circuit Court of Appeals (majority opinion by Judge Learned Hand, dissenting opinion by Judge Thomas W. Swan (R. 63, 68)) are reported in 88 F. (2d) 646, 649.

JURISDICTION

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. §347(a)) and §1003(a) of the Revenue Act of 1926 (44 Stat. 110, 26 U. S. C. §1226(a)). The decree of the Circuit Court of Appeals for the Second Circuit was entered on March 15,

1937 (R. 72). Rehearing was denied on March 11, 1937 (R. 71). Petition for certiorari was filed March 20, 1937, and was granted by an order filed on April 26, 1937 (R. 73).

THE QUESTION PRESENTED

The question presented by this case is as follows:

When the former stockholders of X Corporation pursuant to a plan first formulated after they had severed all interest in X Corporation, give $607,500 (through Y Corporation, which is owned by them) to certain present and former employees, experts and counsel of X Corporation, it being stipulated that:

(a) neither the donors nor X Corporation were under any "legal or *other* obligation" to make the payment; and

(b) the payment was not made or intended to be made "as payment or compensation for any *services* rendered or to be rendered or for any *consideration* given or to be given" by the donees to the donors;

and both donors and donees treat the transaction as a gift in their income tax returns, is this $607,500 payment "compensation for personal service" under §22(a) of the Revenue Act of 1928, or is it a "gift" not subject to income tax under §22(b)(3) of said Act?

Accepting, as we do, the findings of fact by the Board of Tax Appeals, and the record being undisputed, the

function of the Court becomes one to decide whether the correct rule of law was applied to the facts found. *Helvering* v. *Tex-Penn Oil Company,* 300 U. S. 481; *Helvering* v. *Rankin,* 295 U. S. 123, 131 and cases cited.

THE STATUTE

This case is controlled by §22 of the Revenue Act of 1928 (45 Stat. 797-8), the pertinent provisions of which are as follows:

> "SEC. 22. GROSS INCOME.
>
> "(a) General definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
>
> "(b) Exclusions from gross income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> * * * * * * * *
>
> "(3) Gifts, Bequests, and Devises.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);"

STATEMENT

The petitioner did not dispute below, and does not dispute here, the findings of fact by the Board of Tax Appeals (R. 10-14).

The relevant facts are:[1]

Petitioner was an employee of Universal Oil Products Company (hereinafter called "Universal") (R. 50). On January 6, 1931, all the stock of Universal was sold to United Gasoline Corporation (R. 11). Prior to the sale, the stockholders of Universal had formed an investment company under the name of Unopco Corporation to hold approximately $4,000,000 of current assets and cash withdrawn from the treasury of Universal (R. 11). Unopco had no other purpose and did not either in form or in substance continue the business of Universal, which was the developing and licensing of patents (R. 11, 36). Universal continued in business, but with new stockholders (R. 11).

After the sale of the Universal stock and when the stockholders no longer had any interest whatsoever in the business of Universal, one of the stockholders, formerly the President of Universal, suggested to the others that it would be a nice and generous thing to make a gift or honorarium to a number of the old employees of Universal (R. 12, 31). This matter had not been thought of until after the Universal stock had been sold (R. 31, 39). Pursuant to this suggestion, both the directors and stockholders of Unopco voted to pay a bonus to certain former employees of Universal in recognition of their valuable and loyal serv-

---

[1]The evidence consists of the undisputed testimony of two witnesses for the petitioner (R. 28-34) and a stipulation of facts (R. 35-58).

ices to Universal in the past (R. 12).[2] These payments were made during January, 1931 (R. 38).

Universal had been extraordinarily successful in its business, and the sale of its stock netted $25,000,000 (R. 11) representing what was, in effect, a windfall to its old stockholders. The total amount of the distribution by the old stockholders of Universal, through Unopco, to past and present employees of Universal, aggregated $607,500 (R. 12).

The recipients included not merely employees of Universal, but a number of persons who had been out of the employ of Universal for many years—patent attorneys and patent experts, some of whom had not acted for many years, and the sister of an employee of Universal who had been killed in the explosion of a plant thirteen years before (R. 13, 31-32, 58).[3]

---

[2]The resolution adopted by the stockholders of Unopco (which is, in substance, the same as that adopted by the board of directors), reads (R. 12):

> "RESOLVED FURTHER, that this Corporation do appropriate, pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company, in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company, said sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this Corporation shall determine."

[3]See R. 58 for a list of recipients not employees of Universal, either because they were independent attorneys or experts, or because they had previously ceased their employment. See also Reichmann's testimony (R. 31-32).

A number of the letters transmitting the moneys to the beneficiaries are included in the stipulation of facts before the Board (R. 43-49), and they uniformly use language appropriate to gifts, of which the following is typical:

> "Here is the slice of bacon which the old stockholders of Universal want you to have as a gift from them, and which was saved for you out of the party given on January 6 at Chicago"[4] (R. 43).

Again:

> "The enclosed check is sent you on behalf of all the old stockholders of Universal as a gift to you in appreciation of the relationship which has existed, and because you are considered one of the family this piece of cake has been saved for you from the party we gave here January 6" (R. 44).

It is stipulated that neither Universal nor Unopco nor any of the stockholders of either were under "any legal *or other* obligation" to make the payments in question (R. 40, 41). It is further stipulated that none of the recipients "was ever in the employ of * * * or ever rendered any services to" Unopco or any of its stockholders (R. 40). Again, it is stipulated that the "payments were not made or intended to be made" by Unopco or by any of its stockholders "as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given" by the recipients to Unopco or any of its stockholders (R. 41). In fact, the employees had not merely been paid their full salaries for 1930 by Universal, but had, in addition, been paid bonuses for that year by Universal, in amounts

---

[4]The reference to "the party given at Chicago" is to the closing of the sale of the Universal stock for $25,000,000.

not merely proportionate to their salaries, but evidently calculated to compensate them in proportion to their abilities (R. 50-57).[5]

Neither Unopco (from whose treasury the gifts were made) nor Universal nor any of the stockholders of either claimed a deduction for these payments in their income tax returns (R. 13, 42). Petitioner did not return the gift as taxable income (R. 43).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the decision of the Board of Tax Appeals decreeing that there was a deficiency due by the petitioner in respect of his income tax for the calendar year 1931.

2. In holding that the same payments "may be at once 'gifts' under §22, subdivision (b)(3), and

[5]Thus, the bonuses paid by Universal itself for the year 1930 represented varying percentages of the respective salaries for that year, and presumably were meant finally to adjust fair compensation for the full year (R. 50). The petitioner's bonus was 33⅓% of his salary. Taking the first 10 other employees on the list, it will be observed at a glance (R. 50) that their bonuses represented the following respective percentages of their salaries: 33⅓, under 20, nearly 60, 16, over 40, over 50, nearly 100, under 3, nearly 20, and approximately 40. The same variety continues throughout the list of the principal employees. Further emphasis is given by the fact that the subordinate employees received regular bonuses of 10%, thereby emphasizing the consciousness of the effort of Universal itself to adjust the compensation of the key employees. But it was to the key employees that the gifts involved in this and the related cases were made by Unopco. Clearly, these gifts were not primarily intended to adjust compensation, but rather to reflect affection.

'compensation for personal service' under subdivision (a)" (R. 64).

3. In holding that the payments here involved, "though gifts", were taxable (R. 65).

4. In confining gifts, in effect, only to those which result solely because the relation of employee to employer "had bound them in a warm friendship" and in rejecting, as gifts, all those where there exists "something which makes the payment more than an unconstrained act of affection or regard" (R. 66).

5. In holding that the proposal to make a "gift or honorarium" evidenced an intent to pay compensation because the word "honorarium" is "a word never used except to denote a compensatory payment; * * *" (R. 67).

6. In holding that the intent and motive of the donors "was precisely the same as though the shareholders had been the employers of the donees, which they were not" (R. 66).

SUMMARY OF ARGUMENT

Although this case falls within the general classification of cases involving gifts to present or former employees, it is one in which the employment relationship had fully terminated before the making of the payment was thought of. The payment was stipulated to have been without "legal or *other* obligation" on the part of the donors, and for no services rendered or consideration given to the donors. If such a payment be held to be additional compensation, it is hard to conceive of a case in which any employee could ever be held to have received a gift from a present or former employer.

The statute provides different rules for gifts and for additional compensation. The position of the majority of the Circuit Court of Appeals that this was indeed a gift, but a taxable gift, is, therefore, untenable.

The Circuit Court of Appeals confined non-taxable gifts to payments dictated by "unconstrained affection". So confined a construction of the word "gift" is in direct conflict with the English cases, which have been numerous, and finds no support in prior decisions of our Circuit Courts of Appeal. But even if it be sound, it is impossible to conceive a case of payment to a former employee which would more nearly fall within the suggested rule, for these employees were referred to by the donors as "members of the family".

The only plausible argument for taxability of this gift is that it was made in *recognition* of former valuable services. But this factor of recognition is present in every employee case, and to accept the argument is to hold that all gifts to past or present employees must be taxable. Such a ruling contradicts the established rule of all of the circuits prior to this case, for in all prior cases of payments to employees the courts had considered it their duty closely to analyze the various recognized *indicia* for determining whether the particular payment in question was a gift or additional compensation.

In this case, all the previously recognized *indicia* for such determination combined in favor of the petitioner.

The case presents a question of law,—or a mixed question of law and of fact,—whether on the basis of the Board's findings (which we accept) the right rule has been applied. The answer to that question is for the courts to determine.

ARGUMENT

I

THE PAYMENT MADE TO PETITIONER WAS A "GIFT" WITHIN THE MEANING OF §22(b).

(a) The meaning of the word "gift".

Section 22(b)(3) of the Revenue Act of 1928 excludes from gross income the "value of property acquired by gift". In using the word "gift" the Congress meant to employ the ordinary meaning of the term. *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 327; *Old Colony Railroad Co.* v. *Commissioner,* 284 U. S. 552, 560; *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370.

If there were any doubt as to the interpretation of the word "gift", it would have to be resolved in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151; *Burnet* v. *Niagara Falls Brewing Company,* 282 U. S. 648.

But the applicability of the term "gift" to the transaction in this case appears to be supported alike by dictionary definition, Congressional intention and judicial construction.

The word "gift" is defined in Webster's New International Dictionary (2d Ed.) as "anything voluntarily transferred by one person to another without compensation". A similar definition has been laid down by the courts, namely, a "voluntary transfer of property from one to another without any consideration or compensation therefor". *Blair* v. *Rosseter,* 33 F. (2d) 286 (C. C. A. 9); *Noel* v. *Parrott,* 15 F. (2d) 669, 671 (C. C. A. 4).

Although the word "gift" is not defined anywhere in the revenue laws, the committee reports of both the Senate

Committee on Finance and the House Committee on Ways and Means, in explaining what was included within the word "gift" for purposes of the gift tax in the Revenue Act of 1932 (47 Stat. 245), stated:

> "For example, (1) a transfer of property by a corporation without a consideration, or one less than adequate and fully (*sic*) in money or money's worth, to B would constitute a gift from the stockholders of the corporation to B; * * *." (72nd Congress, 1st Session, Senate Report No. 665, p. 39; House Report No. 708, p. 28.)

The gift by the Unopco stockholders, made as it was, voluntarily and without consideration, was of the character which Congress at least supposed that it was exempting from the Income Tax and subjecting to the Gift Tax.

The Circuit Courts of Appeal have also considered the element of the donor's *intent* as controlling, *i.e.*, whether the payment was *intended* as a gift or as compensation. *Fisher* v. *Commissioner*, 59 F. (2d) 192, 193 (C. C. A. 2); *Bass* v. *Hawley*, 62 F. (2d) 721, 722-3 (C. C. A. 5).[6]

(b) The stipulation.

The stipulation of the parties in this case appears to us conclusive that all of the above-noted elements of a "gift" are present here:[7]

(1) The payment to petitioner was *voluntary*. There was no "legal or *other* obligation" on the part

---

[6]The Board of Tax Appeals, however, made no finding as to what the intent of the donors in the instant case was.

[7]Nor is there any conflicting evidence.

of Universal, Unopco or the stockholders of either to make the payment (R. 40, 41).

(2) The payment to petitioner was *without consideration.* It was "not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts [including petitioner] to said Unopco Corporation or to any of its stockholders" (R. 41).

(3) The payment to petitioner was *intended* to be a gift. Since it is stipulated that the payment was not intended "as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given" to the donors (R. 41), and since the donors stated at the time that the payment was intended to be a gift (R. 43-49), the only possible conclusion is that the payment *was* intended to be a gift.

(c) The other facts.

The Commissioner and the Board itself agree that the case must be decided on the whole record and in the light "of all the evidence" (Board op. at R. 21).[8]

The most important consideration which we present to this Court is this: The evidence here is so comprehensively in favor of the petitioner that it is impossible to conceive a

[8]The opinion of the Board is discussed in detail in the Appendix hereto.

case of a payment to an employee which would be non-taxable if this payment be held taxable.

Here, the donor was not an employer, and did not even have the same economic interest as the employer (was not a holding company or affiliated with the employer). The payment was not even thought of or suggested until after all the economic interests between the donor-stockholder and the employing corporation had been finally and irrevocably severed. The language of Unopco's President both in suggesting the gifts to the stockholders, and in making them to the recepients,—language obviously entitled to great weight as having been made spontaneously and informally as part of the *res gestae,*—is consistent only with the theory that these were true gifts. Throughout, his expression is that the ex-employee is regarded as a part of the "family". If Judge Learned Hand's view is to prevail,—that in employment cases payments will be recognized as gifts only when the gift approximates or approaches that which ordinarily dictates gifts to relatives,—then where are we to find a more appropriate case for the operation of the rule than one in which the donees were at the time referred to as members of the "family"?

Even the minor *indicia,* recognized in the decided cases, here combine to favor the petitioners. No tax deduction was sought by the donors, either as individuals, or through the corporate medium that made the gift (the Unopco Corporation). Nor did Unopco rely on directors' action alone, as would have been appropriate if it had been discharging a corporate purpose of its own; but, the gifts being obviously outside the ordinary and proper course of its investment business, they were submitted to and ratified by the individual stockholders.

In effect, the whole government case has, in all of the arguments in the Circuit Courts of Appeal, come down to this: That in no case in an employer-employee relationship, is a gift to be recognized.

The course of argument has been that the Commissioner has first conceded that taxability is in this case placed upon the ground that the donors, although under no legal or other obligation whatsoever, and although receiving no legal or other consideration, yet *recognized* that the donees had rendered loyal services in the past, and that this fact of recognition was confirmed by the use in the corporate resolutions of the word "bonus". The word "bonus" in a corporate resolution is not of course conclusive that a payment to an employee is additional compensation rather than a gift. *Rogers* v. *Hill,* 289 U. S. 581-582. Moreover, the Board itself, in its opinion, recognizes that the language of the resolution is not controlling, citing a decision to that effect in *Levey* v. *Helvering,* 68 F. (2d) 401, affirming 26 B. T. A. 889 (in which, conversely, use of the word "gift" in a corporate resolution was held not conclusive that the payment was a gift).

And no employer-employee relationship would ever in the ordinary course of human affairs give rise to a subsequent gift by the employer to the employee, unless the factor of recognition was in some degree present. As a matter of fact, if the effect of recognition is to destroy donative intent and is to convert gifts into compensation, then few indeed will be the gifts even by blood relatives.

(d) The cases.

It is believed that there is nothing to be gained by an extended analysis of the conflicting decisions of various

Circuit Courts of Appeal upon the distinction between gifts and compensation. It was to resolve this conflict, presumably, that this Court granted certiorari.

The First, Fourth and Fifth Circuits have held that the distribution now before this Court was compensation and not a gift, with respect to other petitioners. *Walker* v. *Commissioner,* 88 F. (2d) 61 (C. C. A. 1); *Hall* v. *Commissioner,* 89 F. (2d) 441 (C. C. A. 4); *Simpkinson* v. *Commissioner,* 89 F. (2d) 397 (C. C. A. 5). Judge Morton dissented in the First Circuit, as did Judge Swan in the instant case in the Second Circuit. The decisions in the Fourth and Fifth Circuits were subsequent in time, and show on their faces that they were made with knowledge of the prior decisions in the First and Second Circuits.[9]

The Third, Sixth and Ninth Circuits have held somewhat similar distributions by corporations to be gifts and not compensation. *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3); *Blair* v. *Rosseter,* 33 F. (2d) 286 (C. C. A. 9) *supra; Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3); *Lunsford* v. *Commissioner,* 62 F. (2d) 740 (C. C. A. 6).

In *Jones* v. *Commissioner,* the stockholders of a corporation sold their stock to third parties for $3,000,000. $300,000 of this amount was by previous agreement distributed to the officers and administrative staff of the corporation, who had been long employed by it, since it was felt that they would lose their positions by reason of change of ownership. The corporation had considered making this payment to its employees, but later the plan was

---

[9]The opinions of the Circuit Courts of Appeal are discussed in detail in the Appendix hereto.

changed, since it was felt that the corporation could not legally make a gift. The officer in charge referred to the desirability of making the payment "in consideration of such a sudden termination of the business association and in recognition of the efforts and devotion of the officers and certain old employees of the companies over a long period of years". (10 B. T. A. 202, 204). The Circuit Court of Appeals stated that the payment was "in recognition of the past faithful work of the staff" (31 F. (2d) at p. 756), reversed the Board of Tax Appeals, and held that the payment was a gift and not compensation.

The case was a distinctly stronger one for the Commissioner than the present case, in that (1) the officers and old employees there suffered the detriment of losing their positions (whereas in our case those who had not previously terminated their employment, continued in the employ of Universal), and (2) the employer had itself considered making the payment (whereas in our case the suggestion that the payment be made never arose until after all relationship had been severed between the corporate employer and the paying shareholders).

In *Cunningham* v. *Commissioner,* the stock of a corporation had been purchased by Canadian interests and a new set of directors elected. The president voluntarily resigned. Thereupon, the board of directors made a payment of $15,000 to the president "in appreciation of Mr. Cunningham's excellent guidance of this corporation during the times of difficulty and depression". The Board of Tax Appeals held for the Commissioner and decided that the payment was compensation. The Circuit Court of Appeals for the Third Circuit reversed the Board of Tax Appeals and held that the payment was a gift.

In *Blair* v. *Rosseter,* a corporation, with full approval of its stockholders, made a payment of $50,000 to its president "as a gift in recognition of his able and successful direction of the affairs of the company through the past ten years". The corporation charged the payment to surplus account, and never made any attempt to deduct it. The Court held that the payment was a gift and not compensation for services.

In *Lunsford* v. *Commissioner,* a corporation made a payment of $50,000 to an employee of another corporation (as in the instant case) who had acted for that other corporation in connection with a transaction in which the donor corporation had purchased property. This payment was made with the assent of the employing corporation. Although it did not appear that the stockholders of the donor corporation had ratified the payment, the Court held that it was a gift.

Bass v. *Hawley,* 62 F. (2d) 721 (C .C. A. 5), was relied upon by the majority opinion in the Court below. In this case, a holding company sold the stock of the El Paso and Southwestern Railroad Company to the Southern Pacific in exchange for stock and bonds of the Southern Pacific. The holding company thus retained an indirect interest in the El Paso. A committee of the board of this holding company was appointed "to compensate employees". After the holding company had effected the exchange, its stockholders authorized its directors to pay "additional compensation" to officers and employees "in recognition of long and faithful service of the officers and employees of the Railroad". Some of the larger payments were divided between two taxable years. The recipients paid tax thereon. They later sued to recover these taxes on the ground that

the payments were gifts. The Court held that the payments were income and not gifts.[10] However, it seems clear that the stockholders authorized "additional compensation" and not gifts. Not only were the payments not called "gifts" at any time, but the donors, because of their indirect interest in the employer corporation, would benefit from the future services of the employees.

Other cases involving the question of whether payments by a corporation to its own employees[11] were a gift or were compensation have been decided on the basis of facts not appearing in the instant case. One or more of these facts has always been present: (1) the payor corporation has treated the payment as salary paid and deducted it as business expense in its income tax return; (2) the stockholders have not approved the payment by the corporation, and since the directors may not give away the assets of the corporation, a payment authorized merely by them has been held to be compensation; or (3) the courts have expressly found that there was consideration for the payment or an obligation to make it. In *Fisher* v. *Commissioner,* 59 F. (2d) 192 (C. C. A. 2); *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9); and *Anderson* v. *Commissioner,* 79 F. (2d) 979 (C. C. A. 2), aff'g 31 B. T. A. 197, the first

---

[10]Other cases involving the same transaction that was under consideration in *Bass* v. *Hawley* are: *Barnes* v. *Commissioner,* 17 B. T. A. 1002; *Schumacher* v. *Commissioner;* 27 B. T. A. 895; *Schumacher* v. *U. S.,* 55 F. (2d). 1007 (Ct. Cls.).

[11]The instant case, of course, involves a payment to the employees of another corporation, not affiliated in any economic or business interest and having no community of interest with the corporation that made the gift.

two factors were alike present; in *Lougee* v. *Commissioner,* 63 F. (2d) 112 (C. C. A. 1), aff'g 26 B. T. A. 23, the first factor was present; in *Levey* v. *Helvering,* 68 F. (2d) 401 (App. D. C.), the second and third factors were present; in *Noel* v. *Parrott,* 15 F. (2d) 669 (C. C. A. 4), cert. den. 273 U. S. 754, the first and second factors were present, and the third factor was present in that the employees gave consideration by their efforts to bring about the sale of the stock itself; in *Davis* v. *Commissioner,* 81 F. (2d) 137 (C. C. A. 6), the Court found ample consideration in that the employees had remained in the employ of the corporation because of promises that they would be compensated beyond their salaries if they remained; and in *Weagant* v. *Bowers,* 57 F. (2d) 679 (C. C. A. 2), the corporation payment was in performance of the corporation's obligation to pay to the employee one-third of the profits from the sale of patents for his inventions.

In the instant case, on the other hand, none of the above factors is present, and there can be no doubt that the payment to petitioner was a gift since it was intended to be such, was made voluntarily, without legal or other obligation, and without consideration to the donor.

II

THE PAYMENT TO PETITIONER, BEING A GIFT, WAS NON-TAXABLE.

A. The theory of the majority opinion below is erroneous.

(1) The majority opinion in the Circuit Court of Appeals apparently proceeded upon the assumption that the

payment to petitioner was a "gift", but was, nevertheless, taxable compensation. Judge Learned Hand stated (R. 64):

> "Such payments may be at once 'gifts' under § 22, subdivision (b)(3), and 'compensation for personal service' under subdivision (a)."

We understand the rule laid down by the majority opinion to be this: (a) That payments to present or past employees which fall within the category of *gifts*, may be of either one of two classes (1) gifts dictated by a belief on the part of the giver that prior services had not been equitably compensated, not necessarily because inequitable at the time of compensation, but also because subsequent events have proved that it would now be inequitable not to add to that prior compensation; and (2) gifts dictated by pure love and affection for the employee as an individual quite regardless of the fact that he or she was or ever had been an employee; and (b) that gifts of the first class are taxable to the recipients, and those of the second class are not.

As Congress has provided (in § 22(b) of the Revenue Act of 1928) that all gifts are exempt from tax, this judicial division into taxable gifts and non-taxable gifts is unwarranted.

(2) The majority opinion below further attempted to justify its position by stating that although § 22(b) of the Revenue Act is entitled "Exclusions", this must have been merely out of abundant caution, since certain items specified therein, such as life insurance, compensation for sickness or injury and "inheritances" could "by no possibility" be income under § 22(a). The argument is illogical on its face; one may as well say that a statute taxing foreigners,

but excluding inhabitants of Canada and Alaska, must be construed to include Canadians because Alaskans would not on a true analysis be deemed foreigners.

But, assuming that the argument had any validity, it does not apply to gifts because there are real doubts as to whether certain types of gifts are income. As Judge Learned Hand, the writer of the majority opinion, himself said in *Rice* v. *Eisner,* 16 F. (2d) 358, 360 (C. C. A. 2):

> "The exemption in all the statutes of the corpus of gifts and bequests shows that in the minds of those who drew the acts it was thought open to question whether even this might not be considered income."

And this Court refused to decide whether life insurance proceeds were income, in *United States* v. *Supplee-Biddle Hardware Co.,* 265 U. S. 189. Life insurance proceeds paid to a corporation have been held to be "earnings and profits". *Cummings* v. *Commissioner,* 73 F. (2d) 477 (C. C. A. 1).

(3) The Court below further attempted to justify its position by citing *Ream* v. *Bowers,* 22 F. (2d) 465 (C. C. A. 2) and *Rose* v. *Grant,* 39 F. (2d) 338 (C. C. A. 5) for the proposition that bequests may be included in gross income under some circumstances. These cases, on the contrary, stand for the proposition that a "legacy" conditioned on performance is not a bequest at all. As Judge Augustus N. Hand said for the same Court in *Ream* v. *Bowers, supra:*

> "We agree with the opinion of Judge Hazel in the District Court that the $50,000 was directed to be paid for personal services, and nothing else, was not a bequest, conditional or otherwise, and consequently was taxable as income" (p. 468).

And this Court, in *United States* v. *Merriam,* 263 U. S. 179, 186-7, has very clearly pointed out that where what is in name a "legacy" is, in reality, a provision for compensation for services to be rendered, it ceases altogether to be a bequest and becomes compensation.

(4) *The Old Colony Trust Case,* 279 U. S. 716.

The Court below then cited *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, for the proposition that a gift may also be "compensation for personal service" and taxable as such. The compensation there was earned, although there was no legal obligation to pay it. And the relevant proposition stated by this Court was merely that lack of legal obligation did not of itself convert compensation into a gift. This Court was careful to point out that there *was* consideration for the payment in question, and certainly did not hold that a voluntary payment *without consideration* was not a gift.

In that case, a resolution providing for the payment of the employee's income taxes had been passed more than one year before the taxable year in question, so that, for that particular year, the employee entered upon his duties under the express agreement that his income taxes would be paid by his employer. This Court showed clearly by its statements, 279 U. S. at pages 729 and 730, that there was a valuable consideration for the payment of the income taxes, and that the payment was, in effect, the equivalent of additional salary:

> "The certificate shows that the taxes were imposed upon the employee, that the taxes were actually paid by the employer and that the employee entered upon his duties in the years in question

> under the express agreement that his income taxes would be paid by his employer. This is evidenced by the terms of the resolution passed August 3, 1916, more than one year prior to the year in which the taxes were imposed. The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore that the payment constituted income to the employee.
>
> * * * * * * * *
>
> "Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute."

Had the payment been a voluntary one *and without consideration,* it must necessarily have been a gift.

B. Even if the theory of the majority opinion below be correct, the payment to petitioner was not taxable.

The theory of the majority opinion below apparently was that the payment to petitioner was a gift made pursuant to a *moral* obligation—a feeling that the services deserved more than they had received—and therefore was more than "an unconstrained act of affection or regard".

Even if one assume that the theory is correct that a gift is taxable if dictated by any motive other than "unconstrained * * * affection or regard", the facts necessary to its application in this case were either expressly stipulated out of the case by the parties, or were not found by the Board.

It is stipulated that the payment was not made pursuant to any moral obligation, that there was no "legal or *other*

obligation" to make the payment on the part of Universal, Unopco or the stockholders of either (R. 40, 41). It follows that, obligation being absent, the gift was "an unconstrained act."

Was it an act "of affection or regard"? We have shown that it was made to the recipients as if "members of the family" of the donors. And the Board did not find that the donors had felt that the petitioner's services to Universal deserved more than he had received, or that the donors had any motive other than "affection or regard". Indeed, there is nothing in the record upon which to base such a finding.

Thus, even upon the theory enunciated by the majority opinion below, the payment in question was a non-taxable gift and was not compensation.

C. The English cases apply *a fortiori* in favor of the petitioner.

The theory of the majority opinion below must be that the mere facts of past employment or association in business and of recognition of past services are sufficient to justify a holding that a gift is taxable compensation.

As has been pointed out above, § 22(b)(3) comprehensively excludes all "gifts" from gross income and exempts them from income tax. It does not merely exclude "personal gifts" or "gifts made solely because of friendship"; but all types of gifts are exempt.

The question as to whether voluntary payments by a corporation or its stockholders to employees were taxable income has arisen on several occasions in Great Britain in the administration of its income tax law. Even though the British statute does not contain an express provision

excluding "gifts" from gross income, the English cases have held that a voluntary lump sum payment made by a corporation, or its stockholders, to the officers or employees of the corporation, cannot be "profits * * * accruing by reason of * * * offices, employments, or pensions" (corresponding to the phrase in our Revenue Acts: "compensation for personal service") merely because the payment may be in recognition of past services. The mere facts that the donees have rendered services to the donor, that the payment is made to the donees "in recognition of past services", and that the payment would not have been made but for the past services, have not been considered sufficient to make the tax payable.

In *Beynon* v. *Thorpe* [1928] 97 L. J. K. B. 705, 44 T. L. R. 610, 14 Tax Cas. 1, a corporation awarded a pension of £5,000 per year to a retired director. After two years' time, this pension was rescinded and the director was given a lump sum of £5,000 which the resolution stated was voted to him, not because he was a director, but "as a personal gift". In holding that the payment was not "profits and earnings of whatever value arising from employments", Judge Rowlatt said:

> "Now the question is whether this ceases to be a mere gift because what has led to it is a past employment, an employment which has ceased. * * * Well, it seems to me that is a complete fallacy. It is nothing but a gift moved by the remembrance of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude or that sort of moral obligation if you please[12]: it is merely a gift of that kind. In

[12]Yet in our case it is even stipulated that there was no moral obligation.

> this case it happens to be very large; in many cases it is very small, but in all cases it seems to me, whether it is a large gift like this or whether it is a small gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks he ought to supply with funds for one reason or another; and as the Lord President in Scotland [*Duncan's Executors* v. *Farmer,* 5 T. C. 417] points out it is only a matter of history that the feeling between the parties which has generated the gift arises out of an employment" (pp. 13, 14 of 14 Tax. Cas.).

In *Cowan* v. *Seymour* [1920] 1 K. B. 500, 7 Tax Cas. 372, reversing [1919] 2 K. B. 146, the shareholders of a corporation which had been liquidated made a payment of about £1,000 from the assets of the corporation to the secretary and chairman of the corporation. The Commissioners of Taxes and the High Court of Justice (King's Bench Division) had held that the payment was taxable. The Court of Appeal, however, reversed and held that the payment was a mere gift. Lord Sterndale said:

> "But the fact that the office is at an end is a fact of very, very great weight, and when you add to that that the payment is made, not by the employer, because it was not made and could not be made here by the company, which was the employer, but is made by other persons—in this Case it was by the shareholders individually—the facts still more point to it not being a payment for services, or a profit accruing by reason of the office.
>
> * * * * * * * *
>
> "But the difficulty I have had is this, whether this is not a question of fact upon which the Commis-

sioners either have found or ought to find, and whether the Case ought not to go back to them. * * *

"But although, with great doubt, I have come to the conclusion that I ought to deal with the facts, and the facts are sufficiently stated for me to deal with them, I think we must take this Case as stating the facts which appear upon it and nothing else, and that the Court ought not to speculate as to whether there might not be something in the relations of these parties and this company with other companies which might throw a different light upon the transaction. I think we must consider for our purpose the facts upon the Case as whole facts, and looking at those as the whole facts I find, as I have said, the very important factor of the office having terminated at present, and the other almost equally important factor that the payment is made, not by the employers, but by somebody else, though in this Case perhaps that is not quite so important, as there is a close connection between the employer, the company, and the persons who gave the money; and the inference, therefore, is that this was money paid to him as a testimonial or tribute for what he had done after his services were over and not a payment for those services. And I think on the facts as they stand the direction should have been given that that is an inference of fact which must be drawn. That being so, I think I am entitled to say that if that is to be, as it is, a question of fact, on the facts as stated only one inference could be drawn, and therefore the appeal ought to succeed, and I suppose will succeed with costs here and below" (pp. 379-380 of 7 Tax Cas.).

In *Chibbett* v. *Joseph Robinson & Sons* [1924] 19 T. L. R. 195, 9 Tax Cas. 48, a firm of ship managers had been employed in that capacity by a steamship corporation.

The corporation went into voluntary liquidation in 1918 and in general meeting authorized the liquidator to distribute £50,000 to the ship managers "as compensation for loss of office". As a matter of fact, the ship managers were rehired by the reorganized corporation.

The High Court of Justice (King's Bench Division) held that the payment was not income, but a mere gift. Judge Rowlatt said:

> "This case is not very unlike the case of *Cowan* v. *Seymour* [7 T. C. 372], where officers of a company who had served for nothing during the life of the company and in the winding up, after the winding up were given by the shareholders, out of their divisible profits, a gift. It was held in the Court of Appeal that there was no evidence which would justify the Commissioners in holding that that was a profit of the offices of these gentlemen [p. 60 of 9 Tax Cas.].
>
> * * * * * * * *
>
> The company as then constituted certainly came to an end, and when it came to an end they gave this solatium to this firm out of their abundant prosperity, once for all, not because of anything they were doing, but really very much, I think, as the Master of the Rolls puts it, as a testimonial for what they had done in the past in their office which had now terminated.
>
> "Of course it is true that it is a trade receipt in this sense, that if these people had not been managers they never would have got it. It was not a gift to them as individuals or anything of that sort; it was because they were people of this kind" (p. 62 of 9 Tax Cas.).

The House of Lords considered this question in *Reed* v. *Seymour*,[13] [1927] A. C. 554, 11 Tax Cas. 625. A cricket club granted a benefit match to a professional cricketer shortly before his retirement from its employ. The King's Bench Division held that this was a donation not subject to income tax. This was reversed by the Court of Appeal in a 2 to 1 decision. The House of Lords, however, restored the decision of the King's Bench Division, and held that the payment was a gift and not income. Viscount Cave, *L. C.*, said:

> "The question to be answered is, as Mr. Justice Rowlatt put it, 'Is it in the end a personal gift or is it remuneration?' If the latter, it is subject to the tax; if the former, it is not.
>
> "Applying this test, I do not doubt that in the present case the net proceeds of the benefit match should be regarded as a personal gift and not as income from the Appellant's employment. The terms of his employment did not entitle him to a benefit, though they provided that if a benefit were granted the Committee of the Club should have a voice in the application of the proceeds. A benefit is not usually given early in a cricketer's career, but rather towards its close, and in order to provide an endowment for him on retirement; and, except in a very special case, it is not granted more than once. Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities" (11 Tax Cas. at pp. 646-7).

---

[13]The opinions in the King's Bench Division and in the Court of Appeal are reported [1926] 1 K. B. 588, and [1927] 1 K. B. 90, respectively.

Lord Phillimore said:

> "My Lords, I do not feel compelled by any of these authorities to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Schedule E. Nor do I think it matters that the gift is made during the period of service and not after its termination, or that it is made in respect of good, faithful and valuable service" (11 Tax Cas. at p. 655).

Since the English cases were decided under an income tax law which does not in terms exclude gifts, their reasoning should have *a fortiori* application in favor of the petitioner.

III

WHETHER THE PAYMENT TO PETITIONER WAS A GIFT OR WAS COMPENSATION IS A QUESTION OF LAW, OR AT LEAST A MIXED QUESTION OF FACT AND LAW, TO BE DETERMINED BY THIS COURT.

The majority opinion below takes the position that the decision of the Board of Tax Appeals that the payment was compensation rather than a gift was final and cannot be reviewed on appeal (R. 67).

However, only the Board's findings of *primary* fact can ever be final. *Helvering* v. *Tex-Penn Oil Company,* 300 U. S. 481, *supra; Helvering* v. *Rankin,* 295 U. S. 123, 131, *supra.* Petitioner does not contest the findings of primary fact by the Board. What petitioner does contest,

is the ultimate finding that the payment was compensation under §22(a) rather than a "gift" under §22(b)(3). Such an ultimate finding is "a conclusion of law or at least a determination of a mixed question of law and fact. * * * It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board." *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, at 491.

The above rule is particularly applicable where the evidentiary facts are undisputed, as they are in this case. *Washburn* v. *Commissioner*, 51 F. (2d) 949, 951 (C. C. A. 8); *Burnet* v. *Lexington Ice & Coal Co.*, 62 F. (2d) 906, 909 (C. C. A. 4).

Applying these principles to the present case, it is apparent that the Board's conclusion:

> "From a careful consideration of all the evidence before us, we conclude that the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts." (R. 21)

is a mixed conclusion of law and fact. "Gift" and "compensation" are words of law, being the statutory phrases; yet they are likewise expressive of ultimate facts.

The ruling of this Court in the *Tex-Penn Oil* case at the last Term appears to us to have finally clarified and settled the law to the effect that this type of ruling must be subject to full court review.

In the present case, the Board made no findings between this ultimate conclusion in statutory language and the findings of primary fact. The ultimate question in this case is one of law: Whether the uncontraverted testimony and

findings of primary fact (which we accept) support the inferences and conclusions of the Board.

It is respectfully submitted that the decree of the Court below should be reversed.

WILLIAM D. WHITNEY,
Counsel for Petitioner,
15 Broad Street,
New York, New York.

GEORGE G. TYLER,
Of Counsel.

APPENDIX

Analysis of Opinions Below

(1) *Board of Tax Appeals* (unreported, R. 9).

After completing its review of the cases which hold that similar payments were gifts, and not taxable, the Board attempts to dispose of them by saying that (R. 16):

> "It does not follow because a *corporation* is not under any *legal* obligation to pay an amount which it does pay to an officer or an employee or one who has rendered services that the amount is not compensation but a tax-free gift." (Italics ours.)

We agree. But the sentence fails to meet this case. First, the gift was not made by the employing corporation. Second, it is stipulated, not merely that both the employer and the donor were under no legal obligation, but that neither of them was under any obligation of any character, and that the donees had rendered no services to the donors. And further the question whether the donor is under an obligation is only one of the many considerations recognized by the decided cases to be applicable.

The Board then turns to the authorities which found that, on the facts of the particular cases presented, the payments in question were not gifts. First place is given to *Noel* v. *Parrott,* 15 F. (2d) 669 (C. C. A. 4), and of this the Board says (R. 16):

> "The facts in the instant case are similar to those in *Noel* v. *Parrott, supra.*"

In truth, it is difficult to conceive of a state of facts more dissimilar. (a) In *Noel* v. *Parrott* the payment was made by the corporation which employed the recipients; in this case, it was made by a company which not merely had not employed them but had no common economic interest (by

affiliation or otherwise) in the corporation that employed them. (b) There, the payment to the employees was stipulated as a term and condition to the agreement of sale of the stock; here, the gift was never even thought of until three days after the sale. (c) There, the gift was to an actual employee; here, the recipients included professors in universities who had occasionally been retained as outside experts in independent patent suits, and persons who had long since left the employment, including even a person who had never been employed at all (sister of an employee who had been killed in an accident in line of duty 12 years before). (d) There, the payment was never referred to as "a gift"; here, the president of the donor invariably called the payments "gifts", recommending it to the stockholders as a "gift or honorarium" and offering it to the recipients sometimes as a "slice of bacon", and again as a "slice of cake", "because we regard you as one of the family". (e) There, consideration was given (1) by continued services up to the time of the sale in reliance upon the undertaking to plaintiff, (2) aid in making the sale itself, and (3) the detriment suffered in losing the job; here, none of those things was present, as the recipients (1) had no promise or indication that such gift was to be made, (2) had no part in effecting the sale, and (3) kept their jobs. (f) There, there was a moral obligation to pay faithful employees because they were losing their jobs; here, it was stipulated that there was no "legal or other obligation" to make the payment. (g) There, the payment was charged on the paying corporation's books to "salary account"; here, it was charged to "surplus account". (h) There, an income tax deduction was claimed by the paying corporation; here, no income tax deduction was claimed either by the employing corporation or by the paying corporation, or by any stockholder.

After reviewing the cases in the same class as *Noel* v. *Parrott,* and making reference to *some* of the distinctions

from those cases asserted by us, the Board answers (R. 19):

> "It is apparent, however, that in making the distribution Unopco recognized and assumed the obligations of Universal to those officers and employees."

This again ignores the stipulation that neither Unopco nor Universal had any obligation, legal or otherwise. There was no obligation of Universal to recognize or assume.

Next, after referring to the resolutions, the Board bluntly says:

> "Unopco was to all intents and purposes a continuation of Universal under another name" (R. 19).

This is not so at all. The exact contrary is stipulated (R. 31). Universal continued its own patent-licensing business, just as it had done before. Unopco did not continue the business of Universal; it was a pure investment company.

The Board then suggests that "the situation was similar to that in *Bass* v. *Hawley*" and related cases (R. 19). In fact, the situation was wholly dissimilar, as in those cases the new company (corresponding to Unopco) indirectly acquired stock of the old company (corresponding to Universal) so that in fact there was a unity of economic interest. Here, the Universal stock was acquired by entirely different parties *from* the stockholders of Unopco.

The Board's opinion then refers (R. 19-20) to the testimony of the Universal attorney in this proceeding; but the only apparent significance in this was that it establishes beyond dispute that the matter of the gift was not thought of until a time later than the complete severance of all relations between the donors and the employing corporation.

The Board's opinion next reviews the language of the resolution of the Board of Directors and stockholders of Unopco (R. 20). Referring to the use of the words "bonus" and "in recognition of the valuable and loyal serv-

ices" in the resolution, the Board says that such use "strongly indicates" that the payments were intended as compensation for past services rendered to Universal. This is absolutely the only evidence to support the government position. In the body of the brief, we have explained why these phrases cannot be made conclusive as against all other testimony. The important points are two: (1) that the Board itself admits that the case must be decided on all the facts and not on the resolution alone; and (2) that, construing the resolution alone, the word "bonus" is by no means inconsistent with the idea of a gift, and the words "recognition of former valuable services" only establish a fact [recognition] which is present in absolutely every case of employer and employee; wherefore a decision against the taxpayer based on this phrase is in fact a decision that there never can be a gift to a past or present employee which will not be construed for tax purposes to be not a gift.

Moreover, that the resolution is not controlling, is recognized by the Board itself in its citation of *Levey* v. *Helvering,* 68 F. (2d) 401 (App. D. C.), affirming 26 B. T. A. 889, in which the word "gift" in a corporate resolution was held not conclusive that the payment was a gift. The principle must apply reciprocally, and the words of the resolution in this case be held not conclusive.

Yet the Board uses *Levey* v. *Helvering* as an argument to reject all the evidence of the simultaneous statements made by the individual (Mr. Halle) who proposed the gifts and to whom was entrusted the privilege of delivering them to the recipients (R. 21). Throughout his letters (R. 43-49), he referred to them as gifts and used like appropriate language. His phrases cannot be ignored on the authority of *Levey* v. *Helvering,* for that case simply stands for the proposition that a self-serving expression in a corporate resolution cannot deprive the government of taxes. It certainly does not stand for the proposition that one must ignore contemporaneous expressions which have the ring

of spontaneity, and constitute the best evidence of the true intention of the donors. To rule that certain evidence is not conclusive is quite a different thing from ruling that it is to be ignored.

Finally, the Board attempts, by citing *Bass* v. *Hawley,* to dispose of our argument that no deduction was taken by the donors (R. 21). But the *Bass* case says that the payor there "might have overlooked or waived his right to deduct"; whereas, in this case, it is expressly proved (R. 33) that Universal discussed the possibility of taking a tax deduction and rejected it because it did not believe it was entitled to a deduction. Of course, this is not conclusive against the government; but it is not fair to reject it as one of the *indicia* in favor of the taxpayer, when it must clearly be recognized that contrary action by Universal would have been advanced by the Commissioner as a most potent argument against the taxpayer. See, for example, the dissenting opinion of Judge Morton in the First Circuit case of *Walker* v. *Commissioner,* 88 F. (2d) 61.

(2) *Second Circuit* (88 F. (2d) 646, R. 63).

Judge Learned Hand, in the majority opinion, states that payments made by Unopco Corporation can be both "gifts" under §22(b)(3) and "compensation for personal service" under §22(a). This statement is manifestly contrary to the wording of the statute, which excludes "gifts" from the operation of §22(a).

The majority opinion then lays down the test to be followed by saying that when the donor is under no legal sanction to make the payment, the decision as to whether the payment is compensatory must depend upon his intent or motive. If, it argues, the payment be made by an employer to an old employee, and the employer feels that the employee has been paid in the past the full measure of anything he was "entitled to" either legally or morally, then the gift does not pay for the services and is not compensation. If,

however, the employer makes a payment to an employee with the feeling that his services have deserved more than they have received, then the gift pays for the services and is more than an "unconstrained act of affection or regard". It states that this latter type of gift is taxable. However, there is nothing in the record to show that the donors in this case felt that the employees had not been compensated to the full measure of anything that they were "entitled to". Indeed, it is stipulated that there was no "legal or other obligation" to make the payments on the part of Universal, Unopco or the stockholders of either. Judge Learned Hand's test, if applied to the facts of this case, would therefore make the payment here involved a non-taxable gift, even on his own theory.

Judge Learned Hand then states that the use of the words "honorarium" and "bonus" is particularly significant as showing that the payment paid for the services. His construction of the word "honorarium" is erroneous. The Third Circuit, in *Cunningham* v. *Commissioner,* 67 F. (2d) 205, uses it as a synonym for "gift".* The word "bonus" is clearly a word which may denote a "gift". This Court, in *Rogers* v. *Hill,* 289 U. S. 582, 591-2, held so-called "bonuses" to corporate officers to be gifts which it was not in the power of the directors to make. In any event, the contemporary statements referring to these distributions as gifts resolve any ambiguity as to the nature of the transaction.

The majority opinion then states that the decision of the Board of Tax Appeals is final in any event since its conclusion was not beyond any reasonable inference from the evidence. But the only real evidence of the intent of the

---

*"The derivation of the word 'honorarium', as given by The Century Dictionary and Cyclopedia, is as follows:

> '[L. *honorarium* (sc. *donum*), a present made on being admitted to a post of honor, neut. of *honorarius,* honorary: see honorary]'."

donors in making the payment is contained in the letters to certain of the recipients in which they are referred to as belonging to the "family" and the payment is said to be in appreciation of the "association throughout the years" (R. 43-49). Therefore, the only evidence points to the conclusion that the payments were not only pursuant to no moral obligation and for no consideration, but that they were an act of "affection or regard".

Judge Swan, in his dissenting opinion, points out that the decision of the Board of Tax Appeals that the payments in question "were additional compensation in consideration of services rendered to Universal and were not tax-free gifts" is not final. The Board of Tax Appeals, he states, made no finding that the payments were intended as additional compensation. He points out that it was stipulated that the payments were not so intended.

Judge Swan states that the facts indicate that the shareholders of Unopco "were moved to an act of 'spontaneous generosity', rather than actuated by a sense of moral obligation to pay for services, inadequately compensated in the past". He also notes that the stockholders of Unopco could receive no possible benefit from payments to former or present employees of Universal.

(3) *First Circuit* (*Walker* v. *Commissioner,* 88 F. (2d) 61).

Judge Bingham, in the majority opinion, lays down the rule that whether a payment shall be deemed taxable compensation or a gift depends upon the intention of the parties, and particularly that of the employer, to be determined by the facts and circumstances surrounding the transaction. He says that where an employee, although he has been paid his agreed salary, is given an additional sum or sums by his employer, this raises a strong presumption that the payments were compensation for services rendered. However, this entirely overlooks the fact that the payments in this

case were not made by the employer, but by an independent corporation. It also disregards the stipulation that the payments were not made as compensation for any services rendered to the donors.

The majority opinion then states that the vote of the directors and stockholders of Unopco was to grant a "bonus", which imports compensation, and Universal was in the habit of giving bonuses to its employees. But the fact that Universal was in the habit of giving bonuses to its employees is beside the point because this payment was not made by Universal. Moreover, the fact that Universal had already given bonuses for the year 1930 is indicative that the payments here in question were of a different nature.

The majority opinion states that the contemporary letters and statements of the president that the payment was a gift merely present a case of conflicting evidence. But all the evidence is in harmony with these contemporary letters; there *is* no conflicting evidence.

And Judge Morton, in his dissenting opinion, points out that there was no evidence before the Board of Tax Appeals warranting the finding that the payment was compensation. He points out that the taxpayer had never been employed by Unopco Corporation in any capacity, and that the payment in question was treated as a gift and was so approved by the stockholders as well as the directors of Unopco.

(4) *Fourth Circuit* (*Hall* v. *Commissioner,* 89 F. (2d) 441).

The opinion states that the finding of the Board of Tax Appeals is amply supported by the testimony in that Universal had made large profits and its original stockholders felt that additional compensation should be paid to those who had aided in the making of the profits. But there is no evidence at all that the original stockholders felt

that additional compensation should be paid, and the Court's statement to that effect completely disregards the stipulation that the payments were not made or intended to be made as compensation for any services rendered to the donors. The opinion then goes on to state that it makes no difference that the payment was made from the assets of Unopco after the transfer instead of from the assets of Universal before the transfer. This completely disregards the stipulation that the payment was not *thought of* until after the transfer had taken place

The opinion also states that the decision of the Board of Tax Appeals is supported by substantial evidence which, as above noted, is not borne out by a reading of the stipulation and the findings of fact.

(5) *Fifth Circuit* (*Simpkinson* v. *Commissioner,* 89 F. (2d) 397).

The Court states that, in a broad sense, a benefit done another without legal obligation is a gift, but construing together the provisions of the income tax statute, when money is paid to a present or former employee in consideration of his services, he receives it as compensation for services. This statement of the Court completely disregards the stipulation that the payments were not made or intended to be made as compensation for any services rendered to the donors.

The opinion then states that the formal resolutions, both of the directors and of the stockholders, called the payments a "bonus" paid in recognition of "valuable and loyal services". The Court takes the position that the wording of the resolution is conclusive, is the best evidence of the corporate act and intention, and that the contemporary statements of the president of the corporation made at the meetings of the directors and stockholders and in presenting the donations must be disregarded. The Court here stands alone, because all the other decisions upon the

question recognize that all the facts and circumstances surrounding the payment must be taken into consideration. Certainly the use of the equivocal word "bonus" in the corporate resolution cannot be conclusive.

The Court finally bases its decision upon the fact that the payment from the assets of Unopco was in recognition of "a felt moral obligation of the old business". This statement is expressly contrary to the stipulation and the findings of fact of the Board that Universal, Unopco and the stockholders of both corporations were under no "legal or other obligation" to make the payment.

In effect, the Fifth Circuit comes the closest to actually saying what we believe that all of the majority opinions were in effect thinking, viz., that there could be no case of gifts to former employees which could be non-taxable, for in effect there must in every such case be some "recognition" in the mind of the donor of the former employer-employee relationship.